

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KLEEN PRODUCTS, LLC, et al.

Plaintiffs,

-vs-

PACKAGING CORPORATION OF
AMERICA, et al.,

Defendants.

Case No. 10 C 5711

Chicago, Illinois
December 13, 2010
9:15 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MILTON I. SHADUR

APPEARANCES:

For Kleen and other
Plaintiffs:

MR. STEVEN A. KANNER
MR. MICHAEL E. MOSKOVITZ
MR. MICHAEL J. FREED
Freed Kanner London & Millen, LLC
2201 Waukegan Road
Suite 130
Bannockburn, IL 60015
(224) 632-4500

MR. DANIEL J. MOGIN
The Mogin Law Firm
707 Broadway
Suite 1000
San Diego, CA 92101
(619) 687-6611

Court Reporter:

KATHLEEN M. FENNELL, CSR, RPR, RMR, FCRR
Official Court Reporter
United States District Court
219 South Dearborn Street, Suite 2144-A
Chicago, Illinois 60604
Telephone: (312) 435-5569
www.Kathyfennell.com

1 APPEARANCES: (Continued)

2 For Plaintiffs Thule: MR. MARVIN A. MILLER
3 Miller Law LLC
4 115 S. LaSalle Street
5 Suite 2910
6 Chicago, IL 60603
7 (312) 332-3400

8 MS. BONNY E. SWEENEY
9 Robbins Geller Rudman & Dowd, LLP
10 655 West Broadway
11 Suite 1900
12 San Diego, CA 92101
13 (619) 231-1058

14 For Defendant
15 Packaging Corporation
16 Of America:

17 MR. BARACK S. ECHOLS
18 MR. DANIEL E. LAYTIN
19 Kirkland & Ellis, LLP (Chicago)
20 300 N. LaSalle Street
21 Chicago, IL 60654
22 (312) 862-2000

23 For Defendant
24 International Paper:

25 MR. NATHAN P. EIMER
Eimer Stahl Klevorn & Solberg, LLP
224 S. Michigan Avenue
Suite 1100
Chicago, IL 60604
(312) 660-7600

MR. GEORGE A. NICLOUD, III
Gibson, Dunn & Crutcher, LLP
555 Mission Avenue
San Francisco, CA 94105
(415) 393-8308

For Defendants
Norampac and
Cascades:

MR. SCOTT M. MENDEL
K&L Gates LLP
70 West Madison
Suite 3100
Chicago, IL 60602
(312) 372-1121

1 APPEARANCES: (Continued)

2 For Defendant
3 Weyerhaeuser:

MS. JENNIFER A. SMULIN DIVER
McDermott Will & Emery, LLP
227 W. Monroe Street
Suite 4400
Chicago, IL 60606
(312) 984-7528

6 For Defendant
7 Georgia Pacific:

MR. JAMES R. FIGLIULO
Figliulo & Silverman
Ten South LaSalle Street
Suite 3600
Chicago, IL 60603
(312) 251-4600

10 For Defendant
11 Temple-Inland:

MR. ANDREW S. MAROVITZ
Mayer Brown, LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

14 For Defendant
15 Smurfit-Stone:

MR. R. MARK McCAREINS
MR. JAMES F. HERBISON
Winston & Strawn, LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

18

19

20

21

22

23

24

25

1 (Proceedings heard in open court:)

2 THE CLERK: 10 C 5711, Kleen Products versus
3 Packaging Corporation.

4 MR. MILLER: Good morning, your Honor. Marvin Miller
5 on behalf of Thule.

6 MS. SWEENEY: Good morning, your Honor. Bonny
7 Sweeney also on behalf of Plaintiff Thule.

8 MR. MOGIN: Dan Mogin, your Honor, on plaintiff of
9 plaintiff Kleen and the other eight plaintiffs.

10 MR. KANNER: Good morning, your Honor. Steve Kanner
11 on behalf of Plaintiff Hatco and the remaining plaintiffs.

12 MR. FREED: Your Honor, Michael Freed on behalf of
13 plaintiff Kleen Products and the other remaining plaintiffs
14 other than Thule.

15 MR. NICLOUD: Good morning, your Honor. Trey Nicoud
16 on behalf of International Paper, defendant.

17 MS. DIVER: Good morning, your Honor. Jennifer Diver
18 on behalf of defendant Weyerhaeuser Company.

19 MR. McCAREINS: Good morning, your Honor. Mark
20 McCareins on behalf of Smurfit-Stone.

21 MR. HERBISON: Good morning, your Honor. Jim
22 Herbison on behalf of defendant Smurfit-Stone.

23 MR. EIMER: Good morning, Judge. Nate Eimer on
24 behalf of International Paper.

25 MR. MAROVITZ: Good morning, your Honor. Andy

1 Marovitz for Temple-Inland.

2 MR. FIGLIULO: Good morning. Jim Figliulo on behalf
3 of Georgia Pacific.

4 MR. MENDEL: Scott Mendel on behalf of Cascades and
5 Norampac.

6 MR. ECHOLS: Good morning, your Honor. Barack Echols
7 on behalf of Packaging Corporation of America.

8 MR. LAYTIN: And Dan Laytin for PCA.

9 THE COURT: Good morning. Let me say at the
10 beginning, as I thought I had suggested last time, that except
11 for the fact that we may be dealing at some other points with
12 substantive matters that affect, for example, defendants on an
13 individualized basis, I'm really troubled by being confronted
14 by the troops en masse because I know that -- you know, I used
15 to practice law, and I know that lawyers like to get paid and
16 clients are entitled to representation, but I think that
17 people ought to be exercising some level of judgment in terms
18 of what we deal with.

19 You know, at this point, I know that the matter that
20 had been tentatively before the bankruptcy court vanished --

21 MR. FREED: Yes, your Honor.

22 THE COURT: -- completely. I saw the order that was
23 entered, and as far as I'm concerned, the issue that we really
24 have before us is the question of representation of the
25 plaintiff class, something in which the defendants are

1 certainly interested, but I would expect, in candor, that what
2 you people ought to try to do, when you have something of this
3 nature on, is to reach some understanding among yourselves
4 about who would be here as a representative and inform the
5 others rather than, as I say, showing -- having all the troops
6 appear -- well, that's really a side issue.

7 Let me address the question that we have.

8 First of all, as you know, the one issue that was
9 raised had to do with how it was appropriate for counsel for
10 Thule who had, I thought, made a mistake in judgment, and not
11 a good one, in terms of dropping Smurfit-Stone, given the
12 nature of the complaint, and the issue that was raised by the
13 other competitor for representation is that that doesn't -- I
14 don't know whether to characterize that as a conflict of
15 interest because I guess it no longer exists, but they say
16 that that's something that ought to be considered.

17 I make no ultimate comment on that, and I should also
18 say at the outset that I am not -- I'm not going to suggest
19 that we engage in the process that is mistakenly referred to
20 as somehow bidding as though it were only a money matter in
21 terms of representation. I'm not going to impose that.

22 I am, however, I think, for purposes of evaluating
23 what seems to be a pair of submissions on behalf of highly
24 qualified counsel with a lot of experience in these areas on
25 plaintiffs' side, I think that there's an added item of

1 information that I ought to have, and it ought to follow the
2 same kind of pattern that I had set up in situations in which
3 I had people speaking to the issue of representation, and that
4 is, I ought to have some indication, which I think could most
5 appropriately be handled by *in camera* submissions, indicating
6 the -- a sense of evaluation of the litigation by each of the
7 putative representatives, representative firms that are
8 involved here.

9 And as I've frequently commented, lawyers from out of
10 town probably are not familiar with this, but the late Hu
11 Will, whom I succeeded, unlike what was it that Jefferson said
12 when he was congratulated on having replaced Benjamin Franklin
13 as our minister to France said, "No, I do not replace
14 Mr. Franklin. I only succeed him," but Hu used to use the
15 Lloyd's of London approach that I would guess most
16 practitioners of any age around here are familiar with, and
17 what it consisted of essentially was the notion that the best
18 way to evaluate or to try to evaluate a lawsuit -- and this
19 would be in the context, for example, of efforts at
20 settlement, but it has a lot of, a lot of echos otherwise --
21 is to make a determination as to what the outcome might be if
22 plaintiffs were totally successful, on which knowledgeable
23 counsel most often come pretty close on both the plaintiff and
24 defense side, and then discount that by the sense of the
25 likelihood of success on which people differ very sharply, but

1 the reason it was called Lloyd's of London approach, of
2 course, is what it amounted to was what would an insurance
3 company charge for insuring against the lawsuit, and they
4 charge a premium that would represent that kind of discount if
5 you'd take aside the costs that have to do with transaction
6 costs.

7 Anyway, I would like to have that from both sides,
8 and also what kind of arrangements each side thought would be
9 appropriate in terms of fee arrangements, just on -- I
10 recognize this is kind of a semi-educated guess, but it seems
11 to me that that's something that is useful for the Court
12 toward making a determination.

13 For those of you who haven't read comments that I've
14 made in the bidding process or some of the cases I've dealt
15 with, including initially an antitrust case, as it happens,
16 not under the securities, private securities litigation
17 aspect, you might take a look at a long opinion that the late
18 Ed Becker, great Judge Ed Becker wrote in the Cendant,
19 C-E-N-D-A-N-T, litigation, in which he quotes a portion of
20 what I had said in that and agreed with that conceptually but
21 said essentially it's a matter of statutory construction that
22 it did not apply in securities litigation.

23 So it seems to me that I need that supplementation in
24 order to make a judgment about which of two, as I say, highly
25 qualified sets of lawyers have put in a pitch for

1 representation.

2 Now, let me just ask each side what's your best
3 judgment about how long it might take to make that kind of a
4 submission? And remember, it's not going to be disclosed to
5 the other side and it's certainly not going to be disclosed to
6 defendants, although I'll ask them whether any of them sees a
7 problem with that kind of *in camera* submission.

8 Mr. Freed?

9 MR. FREED: We would be able to do that in a week,
10 your Honor.

11 MS. SWEENEY: We could probably do it in a week, your
12 Honor. I think a little more time would be helpful, but if
13 your Honor wants it in a week, we can do that.

14 THE COURT: Let's say I'll give you until the end of
15 next week instead. That would be by let's say the 23rd.
16 That's ten days. I would think that should be sufficient.

17 Now, let me turn, if I may, to plaintiffs -- to
18 defense counsel.

19 Does any of you see a problem with that kind of *in*
20 *camera* submission in which I act essentially like the
21 astronomical black hole, information comes in but nothing goes
22 out?

23 (Laughter.)

24 MR. NICLOUD: Your Honor, Trey Nicoud for
25 International Paper.

1 Conceptually, we have no issue with that approach and
2 the -- I guess the only reservation we would express is to the
3 extent plaintiffs either deliberately or inadvertently use
4 that as an opportunity to make evidentiary submissions to the
5 Court. I don't think that's what you're asking.

6 THE COURT: No, I'm not asking for a salesmanship job
7 in that regard, of course; and even if there were one made, I
8 wouldn't -- I wouldn't -- I would not only not put it in the
9 bank, but I wouldn't really give any particular credence to
10 it. After all, I'm a stranger to the dispute. All I know is
11 what I have seen in the consolidated complaint, and I'm
12 certainly not going to credit any kind of advocacy aspect of
13 that.

14 MR. NICLOUD: That would be our only concern.

15 THE COURT: Anybody else see a problem with that?

16 Okay. Then if we have it on the 23rd, I know I've
17 been inflicting pain and suffering on some of my staff here by
18 setting stuff in that next week, and I'm not going to do it
19 here, which I know is going to relieve Sandy somewhat anyway.

20 Suppose I put it into maybe the first week after -- I
21 can do it either in the first week after January 1st or the
22 second week, but I would have to be doing it at an 8:45 time
23 because most of the days are pretty well set for 9:00 o'clock.

24 Sandy, tell me which of the days -- let's start with
25 maybe the 6th and -- the 6th through the 14th.

1 THE CLERK: As far as an 8:45?

2 THE COURT: 8:45, yeah.

3 THE CLERK: The 6th and the 7th, I think, are okay.

4 THE COURT: The 6th, 7th, right?

5 THE CLERK: Uh-huh, or the 14th.

6 THE COURT: So I have one -- I see I do have one on
7 the 10th by the way?

8 THE CLERK: Yes.

9 THE COURT: Okay.

10 All right. So either Thursday, the 6th, or Friday,
11 the 7th, or Friday, the 14th, and I would expect that as we
12 talk now about getting a timing for a response, responsive
13 pleading, I'll see what we're looking at.

14 Well, let me turn to that first. What's -- on the
15 defense side, you have the consolidated complaint. You've had
16 it. What kind of time is it going to take to deal with
17 responsive pleadings?

18 MR. NICLOUD: Your Honor, we've had some discussions
19 with plaintiffs' counsel, and I believe we have an agreement
20 that defendants have indicated we would expect to file a
21 motion or motions, given we have multiple defendants, to
22 dismiss, and the holiday periods unfortunately are upon us.

23 THE COURT: Yeah.

24 MR. NICLOUD: We've talked with plaintiffs, and I
25 understand that they are agreeable that defendants could make

1 those motions on January 14th.

2 THE COURT: Ah, well, then if you were going to get
3 such a motion on January 14th, then let's look at the
4 following week for purposes of a status because we'll see then
5 what plaintiffs' counsel believes is going to be needed in
6 terms of time for a response to the motion or motions, so I
7 will provide then that any defense motions will be made by
8 January 14th, 2011.

9 And that next week is not so bad. I could actually
10 do it at a 9:00 o'clock, I think, several of those days, I
11 believe, although Sandy probably has more than I have listed.

12 THE CLERK: I think an 8:45 would be better.

13 THE COURT: Okay. 8:45 then in the week that begins
14 with Martin Luther King holiday. So I think I have Tuesday,
15 the 18th, or Thursday, the 20th, right, Sandy?

16 THE CLERK: Fine.

17 THE COURT: Okay. Either of those. Probably the
18 20th would be better under the circumstances, okay?

19 So we'll have a status, if that's all right, on
20 January 20th at 8:45. Okay?

21 I think that covers everything for the day, right?
22 Thank you all.

23 MR. MILLER: Thank you, Judge.

24 MR. FREED: Thank you, your Honor.

25 MR. NICOD: Thank you, your Honor.

(Which were all the proceedings heard.)

* * * * *

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kathleen M. Fennell

December 14, 2010

Kathleen M. Fennell
Official Court Reporter

Date